

In the Court of Appeals of the State of Alaska

Michael Carl,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-12980**

Order

for Representation Hearing and Stay of
Briefing

Date of Order: **October 10, 2019**

Trial Court Case No. **3AN-13-06977CR**

Attorney Michael Barber, who represents the Appellant, Michael Carl, has filed a motion for a representation hearing for his client. Mr. Barber explains in the affidavit supporting his motion that Mr. Carl informed him he would like to have a representation hearing so that he can hire private counsel. Mr. Barber has already filed the opening brief, and the reply brief was due on October 4, 2019. Mr. Barber therefore also requests a stay of the deadline for the reply brief pending the outcome of the representation hearing.

As an initial matter, Mr. Carl should be aware that the appellant is not permitted to raise new issues in the reply brief that were not raised in the opening brief. The purpose of a reply brief is to respond to the arguments made by the appellee. Therefore, even if Mr. Carl is able to hire private counsel, private counsel will not be permitted to argue issues Mr. Barber did not raise in the opening brief. If Mr. Carl wishes to challenge Mr. Barber's decisions about what issues to raise in the appeal, he may file an application for post-conviction relief alleging his appellate counsel was ineffective.

If Mr. Carl still wishes to retain private counsel to file his reply brief in this matter, he must find an attorney willing and able to represent him within 60 days. Mr.

Barber will not be permitted to withdraw unless and until new counsel files an entry of appearance in this Court. (Because Mr. Carl is represented at public expense, he does not have the right to reject appointed counsel and have new counsel appointed at public expense in the absence of any showing of cause for that change. *See Mute v. State*, 123 P.3d 1081, 1088 (Alaska App. 2005)).

In the alternative, Mr. Carl may instead choose to represent himself in this appeal. But because he also has a constitutional right to counsel to assist him in the appeal, unless and until he knowingly and intelligently waives that right, any legal proceedings in which he is not represented by counsel would be void. *See Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (holding that a deprivation of the right to counsel is equivalent to a lack of jurisdiction).

If Mr. Carl desires to represent himself, then the superior court must determine whether Mr. Carl is willing to enter a knowing and intelligent waiver of the right to counsel, and if so, whether he is capable of representing himself on appeal.

Accordingly, IT IS ORDERED:

1. Mr. Carl's case is remanded to the superior court to determine whether Mr. Carl wants to hire private counsel. If so, then the superior court shall give Mr. Carl 60 days to retain private counsel, and the superior court shall inform this Court of this circumstance. Mr. Barber will not be permitted to withdraw until the retained attorney files a superceding entry of appearance.

2. If Mr. Carl seeks new appointed counsel, the court must consider whether there is good cause to allow Mr. Barber to withdraw from representing Mr. Carl, and, if so, to appoint new counsel to represent Mr. Carl at public expense. If the superior

court finds that there is no good cause to appoint new counsel at public expense, then Mr. Barber shall continue to represent Mr. Carl, and the superior court shall inform this Court of these circumstances.

3. If Mr. Carl wishes to represent himself, the superior court shall conduct an inquiry to make sure that Mr. Carl understands the benefits of counsel and the dangers of representing himself, and to make sure that Mr. Carl is minimally competent to represent himself — i.e., that he is capable of presenting a comprehensible argument on appeal.

4. As a suggestion, the superior court might advise Mr. Carl of the following aspects of litigating an appeal:

A criminal defendant who wishes to represent himself on appeal should bear in mind that an appellate court can not re-weigh the evidence or re-determine the facts of his case. Rather, an appellate court can only decide whether errors of law or mistakes of procedure were committed during the trial court proceedings. Because of this, it is important for a person who is pursuing an appeal to have a working knowledge of criminal law and criminal procedure, as well as good legal research skills, so that they can find the statutes and court decisions that apply to their case. Attorneys have specialized training and experience in these matters, so it is usually better to have an attorney's assistance when pursuing an appeal.

In addition, it helps to have good writing skills — because, in an appeal, a person's arguments are presented to the court primarily in written briefs.

Moreover, the rules governing an appeal are often technical. (For example, there is Appellate Rule 210(b)(1) — the rule that says that if a person wants the appellate court to have a transcript of what happened in the trial court, the person must designate the portions of the trial court proceedings to be transcribed.) Again, attorneys are generally familiar with

these rules, or can discover them without much trouble, so it is usually better to have an attorney's assistance.

Finally, the appellant cannot raise issues for the first time in a reply brief. The purpose of the reply brief is to respond to the arguments made by the appellee in its brief. If the appellant includes a legal issue in the reply brief that was not raised and argued in the opening brief or the appellee's brief, it will not be considered by the Court of Appeals.

5. If, after Mr. Carl is advised of the benefits of counsel and the dangers of self-representation, he still wishes to represent himself, and if the superior court concludes that Mr. Carl is at least minimally competent to do so, the superior court shall inform this Court of these circumstances. Mr. Carl will be allowed to represent himself in this appeal.

6. If, on the other hand, Mr. Carl decides not to represent himself, or if the superior court concludes that Mr. Carl is not minimally competent to pursue this appeal on his own, then Mr. Barber shall continue to represent Mr. Carl. The superior court shall inform this Court of these circumstances.

7. Because Mr. Carl has a constitutional right to the assistance of counsel on appeal, he must expressly and knowingly waive this right if he wishes to dismiss his court-appointed counsel and represent himself. Accordingly, if Mr. Carl is unable to make up his mind about whether to represent himself, this means that he has not waived his right to counsel, and Mr. Barber shall continue to represent him in this appeal.

8. The superior court's report on these matters shall be transmitted to this Court on or before **November 12, 2019**.

9. The due date for the reply brief is **VACATED**. The Clerk's Office will notify the parties of the new due date upon resolution of the representation issue.

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Entered under the authority of Chief Judge Allard.

Clerk of the Appellate Courts

Ryan Montgomery-Sythe, Chief Deputy
Clerk

cc: Judge Wolverton
Trial Court Clerk

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